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No. 97-1291

In The
Supreme Court of the United States
October Term, 1997

RICHARD A. SCHMIDT,
Petitioner,

v.

SHEET METAL WORKERS' NATIONAL PENSION FUND,
and
SHEET METAL WORKERS' NATIONAL PENSION FUND
BOARD OF TRUSTEES,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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RESPONDENTS PROFFERED "REASONS FOR DENYING THE WRIT" ARE MERITLESS

In their Brief in Opposition, Respondents first proffered reason for denying Petitioner a writ is that there is allegedly no conflict in the "facts, issues and holdings" between the Seventh Circuit's decision below, *Schmidt v. Sheet Metal Workers' National Pension Fund*, 128 F.3d 541 (7th Cir. 1997), and the District of Columbia Circuit's decision in *Eddy v. Colonial Life Insurance Company of America*, 919 F.2d 747 (D.C. Cir. 1990). This is nonsense. It would be difficult to find two cases with facts or issues closer than those in *Schmidt* and *Eddy*. Moreover, the holdings are diametrically opposed.

In *Eddy*, ERISA fiduciary Colonial Life Insurance Company's (Chubb) non-fiduciary employee failed to provide complete and correct material information to an ERISA health insurance plan participant. In *Schmidt*, Respondent ERISA fiduciary National Pension Fund's (NPF) non-fiduciary employee failed to provide complete and correct material information to an ERISA pension plan participant. In *Eddy*, the D.C. Circuit held that such failure constituted a violation of the ERISA fiduciary duty. In *Schmidt*, the Seventh Circuit held that such a failure did not constitute a violation of the ERISA fiduciary duty. This is a direct and obvious conflict.

In their effort to convince this Court that there is no conflict between the circuits, Respondents come very close to directly misrepresenting the facts and the law. In their brief, Respondents tell this Court that unlike the NPF Trustees' employee in *Schmidt* (a "benefit analyst"), Chubb's employee in *Eddy* (an insurance agent) was a "fiduciary" because the D.C. Circuit expressly held that "Chubb [the insurance company] concedes that it is a fiduciary ...". This, however, no more makes

Chubb's non-fiduciary employee a "fiduciary" than Respondent NPF Trustees' own concession that they are fiduciaries makes their non-fiduciary employee a "fiduciary."'[1]

Respondents also attempt to distinguish *Schmidt* and *Eddy*, by claiming that only in *Schmidt* did the fiduciaries provide full and accurate information (a booklet) prior to their employees provision of misinformation. This is a misrepresentation of the facts. In *Eddy*, Chubb had initially mailed Eddy a document containing correct information that contradicted their employee's subsequent provision of misinformation. *Id.*, p. 751. Again, it would be hard to find two more factually similar cases.

In reaching contradictory holdings on virtually the same factual situations, the D.C. and Seventh Circuits thus created incompatible law. In the D.C. Circuit, ERISA fiduciaries have a duty to convey complete and correct material information to plan participants and beneficiaries. Period. Since *Schmidt*, however, in the Seventh Circuit, fiduciaries are absolved from providing complete and correct material information where they use prudently hired and retained, non-fiduciary employees as their informational conduits. This obvious conflict cries out for resolution by this Court.

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[1] In a footnote, Respondents claim that "the only logical inference from the *Eddy* decision" is that the insurance agent who made the misrepresentation to Eddy was a fiduciary. (Opposition Brief, p. 6). Respondents "logic," however, is seriously flawed if it really leads to the inference that one of the insurance agents employed to answer calls from Chubb's insureds regarding their insurance coverage (virtually the same job as Respondent's "Benefits Analyst" in this case) was actually a fiduciary for the Colonial Life Insurance Company of America. It is more logical to infer that an employee in an entry-level position is not a fiduciary of the national company for which he or she works.

Respondents second proffered reason for denying petitioner's a writ is that allowing a cause of action for a failure to provide complete and correct material information would allegedly "jeopardize the solvency of pension plans" like Respondent NPF. (Opposition Brief, p. 7). This "reason," however, goes directly to the merits of whether a cause of action for breach of fiduciary duty, as set forth in *Eddy, supra*, should exist, or whether the Seventh Circuit's conflicting decision in *Schmidt, supra*, is the correct one. This is exactly the issue that this Court should resolve by granting a writ of certiorari.

Briefly, however, Respondents' arguments on the merits in favor of the holding in *Schmidt*, as opposed to *Eddy*, are conclusively wrong. First, Respondents immediately undercut their own argument about "jeopardizing the solvency of pension plans" by noting that under the cause of action for breach of fiduciary duty, the fiduciaries, not the pension fund, would be liable. On its face, then, Respondents' argument that such cause of action would "jeopardize the solvency" of ERISA pension funds is clearly illogical.

In further arguing the merits of the Seventh Circuit's decision in *Schmidt*, Respondents move from the foregoing lapse in logic to a misstatement of law. They argue that "[e]very court of appeals to have considered the issue supports the Seventh Circuit's rejection of Schmidt's breach of fiduciary claim against the Trustees based on an alleged oral misrepresentation by a non-fiduciary ...". (Opposition Brief, p. 8). In support of this broad statement of the law, Respondents then discuss a single case: *Pohl v. National Benefit Consultants*, 956 F.2d 126 (7th Cir. 1992). *Pohl*, however, does not support Respondents

contention at all.[2]

In *Pohl*, an employee of an insurance company that served as an ERISA health plan administrator, misrepresented plan coverage to a participant. The participant sued under state law for negligent misrepresentation. The health insurance company removed to federal court and the Seventh Circuit stated that ERISA superseded state law and there was no cause of action for negligent misrepresentation under ERISA. *Id.*, p. 128. Significantly, the Seventh Circuit then stated:

> But is there truly no remedy? ... for breach of fiduciary duty ERISA does provide remedies ...

Id. The Seventh Circuit then precluded a breach of fiduciary claim in that case because the insurance company was not an ERISA fiduciary, not because the insurance company's employee, who made the actual misrepresentation, was not an ERISA fiduciary. *Id.* In this case, however, Respondent NPF Trustees are indisputably ERISA fiduciaries. Thus *Pohl* directly supports Schmidt's right to sue Respondent NPF Trustees for breach of fiduciary duty for their failure to disclose complete and correct material information. This indicates that *Schmidt* not only conflicts with *Eddy*, but that *Schmidt* was wrongly decided as a matter of law.

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[2] Nor do Respondents' string citations in footnote 5 of their Opposition Brief. In each of the cases cited by Respondents, where the court sought to determine whether a claim for breach of fiduciary duty would lie, it looked to the nature of the *entity* which made the alleged misrepresentation, *not* whether the *individual person* who said or wrote down the words constituting the actual misrepresentation was a fiduciary. *Eddy* follows this clear trend in the law. *Schmidt* constitutes a radical departure.

Respondents also argue that disallowing a cause of action for their failure to provide complete and correct material information protects "benefit plan participants and beneficiaries from uncertainty and radical changes to their future benefits." (Opposition Brief, p. 9). This argument is a red-herring. If Petitioner prevails in this case, the NPF plan will not change one iota. The only change will be that Respondents will have an incentive to more carefully carry out their fiduciary duty to provide complete and correct material information to plan participants. This was clearly the reasoning behind the holding in *Eddy*.

Finally, Respondents argue that the result Schmidt seeks -- i.e. an application of the holding in *Eddy* -- would make them "insurers for non-fiduciary employees' ministerial errors." (Opposition Brief, p. 9). Respondents, however, misunderstand the difference between a "ministerial employee," and a "ministerial error." In this case, Respondents used a ministerial employee as conduit to convey material information to participants. The fact that their employee -- Respondents' chosen mouthpiece for the provision of information -- rather than an actual fiduciary failed to provide Petitioner with complete and correct material information, however, does not somehow change what would have been a breach of fiduciary duty if done by a fiduciary, into a "ministerial error" when done by the fiduciary's employee. To hold otherwise, is to create a huge loop-hole by which ERISA fiduciaries can avoid their duty to provide complete and correct material information. This is the loop-hole that the D.C. Circuit closed in *Eddy*, and the Seventh Circuit reopened in *Schmidt*.

CONCLUSION

Schmidt and *Eddy* are in direct conflict on an issue that is of the utmost importance to millions of pension plan participants and beneficiaries. Petitioner Richard Schmidt respectfully requests that this Court grant his Petition for Writ of Certiorari in order to resolve this conflict.

Respectfully submitted,

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